Judicial Control in Complex Economic Matters

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Introduction

I. Some principles of legality control

II. What complex economic assessments?

III. One formula to assess three different issues

IV. Final comments
I. Some basic principles

Article 263
[The Court] shall ...have jurisdiction in actions ...on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

Article 265 TFEU
Failure to adopt act that could have been challenged under Article 263 TFEU

Not Article 261 on unlimited jurisdiction
Only in situations where regulations confer that power
I. Some basic principles

- Legality is assessed at the date at which the administration adopted the contested act
- Challenge on the basis of pleas and not ex officio control (see British Airways, C-122/06P, 14 November 2017), with public policy exception
- Controlling legality of conduct not its expediency
  - No possibility to substitute view of administration by views of GC
- Margin of assessment for administration (especially in complex matters)
  - Infringement of procedural rules, manifest error of assessment or misuse of powers
I. Some basic principles

Two questions?

• What is a complex (economic) assessment?

• What is a manifest error?
II. Complex (economic) assessments

• Difference between facts and assessments

• Not always related to economic phenomena
  • e.g. environmental and pharmaceutical issues

• Economic assessments
  • retrospective ↔ prospective
  • Assessing assessments :
    • margin of discretion of Member State
    • margin of discretion of EC

• Repressive action ↔ presumption of innocence
II. Complex (economic) assessments

• Articles 101 and 102 TFEU
  • economic and legal context
  • ground 139 Intel (C-413/14 P):
    • first, the extent of the undertaking’s dominant position on the relevant market and,
    • secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount;
    • it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market
• AEC test
• conditions of Article 101§ 3 ?
II. Complex (economic) assessments

Regulation 139/2004
Legal concepts
• definition of concentration (Article 3)
• dimension of the concentration (Article 1)

Economic assessment
• compatibility with internal market (Article 2)
II. Complex (economic) assessments

- Article 107, paragraph 1, TFEU
  - Concept of aid,
    - both legal and economic components
    - objective concept
  - Condition of advantage:
    - Private investor test
    - Altmark conditions
- Article 107, paragraph 3, TFEU
  - compatibility
- Article 106, paragraph 2, TFEU
  - SGEI
III. One formula for 3 different issues

Tetra Laval C-12/03 P, ground 39

“Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether [1] the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains [2] all the information which must be taken into account in order to assess a complex situation and [3] whether it is capable of substantiating the conclusions drawn from it.”
III. One formula for 3 different issues

Origin of the formula

• Tetra Laval: Commission considered that GC had exceeded the limits of its judicial competence

• Same claim in field of State aid in in Scott, C-290/07 P:
  • However, when conducting such a review, the European Union judicature must not substitute its own economic assessment for that of the Commission (...). The review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (...).

So, judicial control in all areas of competition law the same?
III. One formula for 3 different issues

Antitrust and Fines: Specific burden on general Court: e.g. Kone, C-510/11 P, 24 October 2013:

‘As the Court of Justice has already observed in paragraph 35 of Schindler Holding and Others v Commission, the European Court of Human Rights has held that, in administrative proceedings, the obligation to comply with Article 6 of the ECHR does not preclude a ‘penalty’ from being imposed by an administrative authority in the first instance. According to the European Court of Human Rights, compliance with that provision requires, however, that decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include, according to the same judgment of the European Court of Human Rights, the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it (judgment of the European Court of Human Rights in A. Menarini Diagnostics S.R.L. v. Italy, no. 43509/08, 27 September 2011, § 59).’ (ground 22)
III. One formula for 3 different issues

Antitrust and fines

• Article 2 of Regulation 1/2003: burden of proof rests on claimant
• Standard of proof (e.g. Icap, T-180/15 (grounds 115 and 116)
  • In order to establish that there has been an infringement of Article 101(1) TFEU, the Commission must produce firm, precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement (…).
  • Moreover, where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement. Indeed, the presumption of innocence constitutes a general principle of EU law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union (…).
III. One formula for 3 different issues

Antitrust and fines: Test based on presumption of innocence and absence of doubts goes beyond a plausibility test (e.g. Cisac, T442/08)

Two consequences

- in presence of two equally plausible assessments of a complex situation, the assessment put forward of the ‘accused’ should prevail
- Even if the Commission’s assessment is more plausible, it cannot justify the finding of an infringement where it leaves doubts
III. One formula for 3 different issues

Difference with other areas of competition law
Merger control,
• Compatibility issue is necessarily a plausibility test because of its prospective nature
• Applicant must show that the Commission’s assessment is incorrect or that its assessment is more probable

State aid control
• Ambiguous nature of concept of aid: both objective/legal and complex
• Where complex, same test as under merger control
IV. Final comments

Treaty system of legality control, a choice made in 1952

System has evolved in time
• Adjustments to specific needs of the various areas of EU law
• In particular as regards repressive action
  • Timing of the action, Knauff Gips, C-407/08 P
  • Presumption of innocence

Judicial control is (still) a human activity